

## REMARKS

Consideration of the election/restriction is respectfully requested. Claims 1-37 are pending in the application. Claims 34-37 stand withdrawn from consideration as being drawn to a non-elected invention.

### *Election/Restriction*

The Examiner's September 19, 2000 Office Action, paper number 5, indicates that claims 1-37 are subject to restriction or election requirement. The applicant hereby provisionally elects claims 1-33 for consideration. This election is made with traverse, for the prosecution of claims 1-33.

The Applicant traverses on several grounds. First, it is urged that the subject matter of the withdrawn claims would not require additional search rising to a level of an undue burden. The field of search for the subject matter of the withdrawn claims is intimately associated with the elected subject matter. It is reasonable to conclude that a search in any of the three subclasses would lead to relevant art in the elected subject matter. Further, it is noted that all three subclasses cited by the Examiner are not exceptionally large (229 patents in subclass 112, 461 patents in subclass 115, and 242 patents in subclass 592, see attached print-outs).

More critically, each subclass contains highly diverse subject matter, given the broad range of food products and the consequent wide range of food related patented processes compositions and products. A perusal of titles in these classes demonstrates this diversity, and leads to the conclusion that a search in all three subclasses will be fast because many patents can be eliminated from consideration quickly. This is in contrast to other subclasses containing patents having less diverse subject matter. The attached print-outs, showing the diverse titles in the three subclasses, provides evidence supporting this assertion.

In addition, the Applicant respectfully urges that the Examiner reconsider the Examiner's assertion

that groups I and II are related in an intermediate-final product relationship where distinctiveness is proven “if the intermediate product is useful to make other than the final product.” The claims of group I are basically directed to capsules used for delivery and consumption of recreationally relevant quantities of alcohol (See claim 1). With such limitation, it is unreasonable to state in the Detailed Action that “the intermediate product is deemed to be useful as a carrier for pharmaceuticals . . .” The specification identifies such prior products and their uses, and differentiates the present invention from capsules used in pharmaceutical applications. As such, Applicant takes exception to this approach to proving distinctiveness.

Further, the Applicant believes that the general characterization of the intermediate-final product relationship is not appropriate in this instance. MPEP s. 806.04(b) states “Typically, the intermediate loses its identity in the final product.” In the kits of claims 34 and 35, capsules containing wine or other alcohol would not lose their identity, but would be separably identifiable in the kits. The Applicant therefore respectfully urges that the basis for restriction, the characterization as intermediate-final product, is not appropriate in the case of the present invention.

Also in regard to group II, the Applicant notes for the record that although claim 34 is directed to a wine-tasting kit, claim 35 is not specifically directed to or limited to wines. Therefore, the Examiner’s description of Group II should be corrected, removing the descriptor “drawn to wine-tasting kit.”

With regard to the Examiner’s evaluation of groups I and III (paragraph 3 of Paper No. 5), the Applicant asserts the same argument as above regarding use of the present invention as a carrier for pharmaceuticals. Namely, the present invention is limited and directed to non-pharmaceutical purposes, and therefore the pharmaceutical example is not relevant.

Based on the foregoing, the Applicant asserts that the Examiner has not established a *prima facie* case for restricting the claims of the present invention. Further, the search subclasses are within the

same class, and are sufficiently similar and overlapping as to be considered the same, or, in the alternative, to not constitute an undue search burden.

Accordingly, reconsideration and withdrawal of the restriction requirement is respectfully solicited.

The Examiner is invited to call the undersigned if clarification is needed on any aspect of this Provisional Election with traverse, or if the Examiner believes a telephonic interview would expedite the prosecution of the subject application to completion.

Respectfully submitted,



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